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IN THE COURT OF APPEALS OF INDIANA

JABARI K. WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 10A01-0607-CR-296
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile A. Blau, Judge
Cause No. 10D02-0409-FA-483

April 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Jabari K. White appeals his three convictions for dealing in cocaine,[1] each as a Class A felony and one conviction for possession of a sawed-off shotgun[2] as a Class D felony. White raises the following restated issues:

I. Whether White was denied his right to self-representation.

II. Whether there was sufficient evidence to support his conviction for possession of a sawed-off shotgun.

III. Whether his sentence was appropriate.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

In August of 2004, a Jeffersonville Police Detective and a confidential informant conducted two controlled buys of crack cocaine from White. The first purchase was within one thousand feet of a city park, and the second was in front of White's apartment.

The detective later obtained a search warrant for White's apartment. There, the police discovered plastic baggies containing crack cocaine, cocaine in the freezer, cocaine residue under the stove, and several sets of scales and baggies. They also discovered a sawed-off shotgun.

White was charged with three counts of dealing in cocaine, two counts of possession of cocaine, and one count each of maintaining a common nuisance, possession of a sawed-off shotgun, and possession of a firearm in a controlled substance offense. On two occasions, White requested that the trial court discharge his counsel and reappoint

[1] *See* IC 35-48-4-1.

[2] *See* IC 35-47-5-4.1. White was charged with possession of a sawed-off shotgun pursuant to IC 35-47-5-4.1. This statute prohibits *dealing* in a sawed-off shotgun, which may be proven by possession of a sawed-off shotgun.

other counsel or, in the alternative, give him the opportunity to proceed *pro se*.

On March 1, 2006, a jury found White guilty of three counts of dealing in cocaine, and one count of possession of a sawed-off shotgun. After a sentencing hearing, the trial court stated:

> [White] has several charges, arrests and convictions on possession of firearms over the last ten years; he also has several charges of serious drug offenses including dealing and trafficking; he has several charges of assault and resisting arrest many of which occurred at same time there were drug and or firearms charges; he has been in prison on at least two occasions and commits offenses within months after being released; he has violated probation, home incarceration and parole; he has been written up while in incarceration for making contraband and tampering with doors just before trial; and the particular facts of this case note three separate A felony transactions with a gun either on or close by to his person when the search warrant was executed involving one of the . . . A felonies.

Appellant's App. at 160. The trial court found as a mitigating factor that White had a child, but that there was no proof that he had paid support for her or visited her. *Id.* at 161. The trial court also said that White was articulate and had the ability to work and improve himself, but there was no indication that he used these skills in a positive manner. *Id.*

The trial court sentenced White to two concurrent forty-year terms for the first two A felonies, thirty years for the third A felony, and three years for the D felony, running concurrently, but consecutive to the two initial A felonies. The total sentence was seventy years executed in the Department of Correction. White now appeals. Additional facts are included as necessary.

DISCUSSION AND DECISION

I. Self-Representation

White contends that the trial court denied him his right to self-representation.

A criminal defendant is entitled to the right of self-representation under the Sixth Amendment to the United States Constitution. *Faretta v. California*, 422 U.S. 806 (1975); *see also Sherwood v. State*, 717 N.E.2d 131, 134 (Ind. 1999) (describing and following the *Faretta* decision). The United States Supreme Court held that a state may not, "constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Sherwood*, 717 N.E.2d at 134 (citing *Faretta*, 422 U.S. at 807). The Court stated that an accused has a personal right "to make his own defense." *Id.* (citing *Faretta*, 422 U.S. at 819). Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Id.* (citing *Faretta*, 422 U.S. at 821). Although a defendant will lose the benefit of competent representation and may also conduct his defense to his own detriment, he has a constitutional right to do so. *Id.* (citing *Faretta*, 422 U.S. at 834).

To proceed *pro se*, however, a defendant must knowingly and voluntarily waive the right to counsel. *Sherwood*, 717 N.E.2d at 135 (*analyzing Godinez v. Moran*, 509 U.S. 389, 399-400 (1993)). This "inquiry focuses on whether the defendant actually understands the significance and consequences of his choice and whether the decision is uncoerced." *Sherwood*, 717 N.E.2d at 135 (citing *Godinez*, 509 U.S. at 401 n.12). Thus, in order to proceed *pro se*, a defendant must be competent to stand trial and knowingly,

intelligently, and voluntarily make a timely and unequivocal waiver of counsel. *Sherwood*, 717 N.E.2d at 135.

In *Osborne*, the Indiana Supreme Court addressed a request for self-representation. There, the trial court denied the defendant's request to proceed *pro se* at the initial hearing, and he failed to renew his request at the subsequent hearing. *Osborne v. State*, 754 N.E.2d 916, 921 (Ind. 2001). Our Supreme Court noted that "it would have been better practice for the trial court to determine Osborne's competency and advise him of the perils of proceeding [*pro se*] before ruling on his request . . ." *Id.* But, since the defendant never acted consistent with his previous request, nor renewed it, the Court held that the trial court did not violate his right to self-representation. *Id.* at 921-22 (citing *cf. Stone v. State*, 531 N.E.2d 191, 194 (Ind. 1988) (declaring that when defendant makes motion for speedy trial, he is required to maintain position reasonably consistent with that request; otherwise, he is considered to have abandoned request, and motion ceases to have legal viability)).

Here, in July 2005, White originally filed a motion to discharge his appointed counsel, and a hearing was held on that motion. At the hearing, White stated that he wanted new counsel or, in the alternative, to proceed *pro se*. *Tr.* at 4. The judge refused the appointment of new counsel and informed White that in a case of this nature it was not in his best interests to proceed *pro se*. *Id.* at 32. White agreed, and the matter was not raised during any other hearings until January 2006, when White filed another motion to have his public defender replaced or, in the alternative, to proceed *pro se*. At the final pretrial hearing, the trial court addressed White's *pro se* motion, and the following

dialogue occurred between the trial court and White:

> The Court: And I'm advising you that we won't reappoint a public defender or give you a new one. So and I don't think in a case of this magnitude where you're talking about hundred and eighty possible years that unless you're an attorney you are competent enough to represent yourself. Do you agree?
>
> Defendant: Correct.

Id. at 36. Like *Osborn*, we hold that White abandoned his request to self-representation. White at no time made an unequivocal waiver of his right to counsel nor did he act consistent with his renewed request to proceed *pro se*. Therefore, White was not denied his constitutional right to self-representation.

II. Sufficiency of the Evidence to Prove Possession of a Sawed-off Shotgun

White contends that there was insufficient evidence presented to support his conviction for possession of a sawed-off shotgun in two respects: 1) the length of the gun was greater in length than the statute prohibits; and 2) he did not have constructive possession.

In reviewing a sufficiency of the evidence claim, we neither reweigh the evidence nor assess the credibility of the witnesses. *Iddings v. State*, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), *trans. denied*. We look to the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

In order to find White guilty of possession of a sawed-off shotgun the State had the burden to prove that he possessed a shotgun having one or more barrels less than

eighteen (18) inches long or any weapon made from a shotgun if its overall length is less than twenty-six (26) inches. IC 35-47-5-4.1; IC 35-47-1-10. The statute only requires a showing of one of the two factors. *Hall v. State*, 791 N.E.2d 257, 260 (Ind. Ct. App. 2003); *Brooks v. State*, 448 N.E.2d 1249, 1251 (Ind. Ct. App. 1983).

Here, the shotgun allegedly possessed by White had an overall length of 27.5 inches, an inch and a half longer than prohibited. The interior barrel length with the firing mechanism measured 22 inches, and the exterior exposed barrel length was 17 inches. As the State concedes, "the statute does not specify how the barrel is to be measured – by its interior or exterior length." *Appellee's Br.* at 15. This ambiguity in the statute must be construed against the State and in favor of White. *Pennington v. State*, 426 N.E.2d 408, 410 (Ind. 1981). Thus, there was not sufficient evidence to support a finding that White possessed a sawed-off shotgun in violation of the statute.[3]

III. Sentencing Propriety

White claims that his sentence is inappropriate for two reasons. Specifically, he contends that the trial court improperly used aggravators to: 1) enhance his sentences; and 2) run them consecutively to each other. Because we exercise our right under Indiana Appellate Rule 7(B), *sua sponte*, and remove the consecutive nature of White's sentences, we need not address White's second argument.

Sentencing determinations are within the discretion of the trial court, and a trial court may only be reversed for an abuse of that discretion. *Fuller v. State*, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), *trans. denied*.

[3] Because the shotgun does not meet the lengths prohibited by statute, we need not address White's constructive possession argument.

White first contends his crimes were committed *after* the United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which required, pursuant to the Sixth Amendment of the United States Constitution, that any fact used to enhance a defendant's sentence must be presented to a jury and proven beyond a reasonable doubt. White continues that his crimes were committed *before* the Indiana legislature revised our sentencing statutes and changed the presumptive "fixed" term sentence to an advisory sentence, *see* IC 35-50-2-1.3, permitting a trial court to impose any lawful sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." IC 35-38-1-7.1(d). In sum, White argues, that the revised statutes do not apply and that in order for the trial court to enhance his sentence from the presumptive sentence it must have submitted those aggravators used for enhancement to the jury to be proven beyond a reasonable doubt; and, in this case, it did not.

White concedes that, regardless of what law applied at the time of his sentence, a trial court may use a defendant's criminal history to enhance a sentence "without any additional findings by a jury." *Appellant's Br.* at 30; *see also White v. State*, 838 N.E.2d 1019, 1020-21 (Ind. 2005). White's criminal history included at least seven prior convictions for drugs, firearms, and other crimes. This alone permitted the trial court to enhance White's two Class A felony dealing in cocaine convictions from the advisory/presumptive sentence of thirty years to forty years. *See White*, 838 N.E.2d at 1021. The trial court did not abuse its discretion in enhancing White's sentences.

We now choose to exercise our discretion under Indiana Appellate Rule 7(B). This court may revise a sentence it finds inappropriate based on the nature of the offense

and the character of the offender. *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006) (citing Ind. Appellate Rule 7(B)). Here, all of White's offenses were drug related. The police made two controlled buys from White, and White was apprehended at his apartment, where there was a sufficient amount of cocaine to constitute dealing. Further, the trial court stated that White is an articulate individual, who could use his abilities to work outside of prison and improve his situation. *Appellant's App.* at 161. Although White is not a model citizen, and dealing in cocaine is a serious crime, we find that seventy years executed is an inappropriate sentence based on White's character and the nature of the offenses. Therefore, we instruct the trial court on remand, to remove the consecutive disposition of White's sentences and order him to serve forty years in the Department of Correction.

Affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and FRIEDLANDER, J., concur.